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Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence*

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I. INTRODUCTION

The notion of insuring against political risk is nothing new. It dates back at least to the time when Englishmen sat around the table at the Lloyds coffee house in London, betting whether British merchant ships would slip past the guns of England's maritime rivals. Many bankers would say, with some justification, that banks have been insuring political risks for centuries and are, in fact, the ultimate political risk insurers. The notion of carving out political risks, treating them separately from other risks, and insuring against them is, however, of more recent vintage.

The use of political risk investment insurance by the United States Government to encourage private investment in foreign countries dates back to the 1948 Marshall Plan, when limited investment guarantees were offered to encourage private American companies to invest in war-ravaged Europe.[1] The program guaranteed only that currency the investor received as income from his or her investment could be converted into United States dollars.[2] By the late 1950s, Congress had directed the

* This commentary is based on a speech given at Hastings College of Law at a symposium on Political Risk Management. The author wishes to thank Ms. Patricia A. Herb, a law student at the Georgetown University Law Center and an intern in Overseas Private Investment Corporation's Office of the General Counsel, for her diligent efforts to convert the original speech into this commentary. Any substantive errors, however, are entirely attributable to the author.

1. Economic Cooperation Act, § 111(b)(3), 62 Stat. 144 (1948). For a more complete discussion of the background of the OPIC program, see Franklin & West, *The Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Developmental Role of Investment Insurance*, 14 TEX. INT'L L.J. 1 (1979).

2. Congress extended the convertibility guarantee. Some members of Congress believed

program away from Western Europe and toward its present purpose of promoting United States private investment in friendly developing countries.[3] The scope of the insurance coverage was expanded to include the major political risks that concerned members of the business community investing abroad in the less developed countries (LDCs): expropriation, transfer risks, and risks associated with political violence.[4]

By the 1960s, other major industrial countries had begun to offer similar incentives to their nationals to encourage investment in LDCs.[5] Also during the 1960s, Congress authorized additional investment incentives, such as project financing and preinvestment survey grants, to stimulate further United States investor interest in the developing world.[6] This program was run by the Agency for International Development (AID), but AID was not well equipped to handle the increasing volume of applications during the 1960s.[7] The difficulties incurred in administering the program led to a search for a better administrative structure. In 1968, a Presidential advisory committee concluded that an independent agency with a corporate structure and a mixed public-private board of directors would provide an appropriate balance of managerial flexibility and policy control.[8] This recommendation and growing investor com-

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that the desire of American businesses to expand abroad was thwarted by their inability to transfer foreign currency into United States dollars. *See* H.R. REP. NO. 1585, 80th Cong., 2d Sess. (1948); Franklin & West, *supra* note 1, at 2-5.

3. FOREIGN ASSISTANCE ACT OF 1961, REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. REP. NO. 612, 87th Cong., 1st Sess. 79 (1961); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO A MUTUAL SECURITY PROGRAM, H.R. DOC. NO. 144, 84th Cong., 1st Sess. (1955). The catalyst for changing the direction of the program to the developing world was President Truman's Point Four Address to Congress in 1950. Truman explained that the communist threat necessitated a program to assist and accelerate the development of economically underdeveloped areas of the world, a task which could be assisted by foreign direct investment. U.S. DEP'T OF STATE, PUB. NO. 3719, MESSAGE FROM THE PRESIDENT TO THE CONGRESS, POINT 4: COOPERATIVE PROGRAMS FOR AID IN THE DEVELOPMENT OF ECONOMICALLY UNDERDEVELOPED AREAS 97 (1950).

4. MUTUAL SECURITY ACT OF 1954, REPORT OF THE COMMITTEE ON FOREIGN AFFAIRS ON H.R. 9678, H.R. REP. NO. 1925, 83d Cong., 2d Sess., pt. I, at 89; MUTUAL SECURITY ACT OF 1956, REPORT OF THE COMMITTEE ON FOREIGN AFFAIRS ON H.R. 11356, H.R. REP. NO. 2213, 84th Cong., 2d Sess., pt. I, at 34, 67; MUTUAL SECURITY ACT OF 1959, REPORT OF THE COMMITTEE ON FOREIGN AFFAIRS ON H.R. 7500, H.R. REP NO. 440, 86th Cong., 1st Sess., § 413(b)(4)(B)(ii), at 84-88.

5. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INVESTMENT IN DEVELOPING COUNTRIES (5th ed. 1983).

6. Act for International Development, ch. 2, 75 Stat. 430 (1961) (codified as amended at 22 U.S.C. § 2151 (1982)).

7. *See* Hornbostel, *Investment Guaranties: Bureaucracy Clogs the Flow*, 4 COLUM. J. WORLD BUS. 37 (1969).

8. INTERNATIONAL PRIVATE INVESTMENT ADVISORY COUNCIL, THE CASE FOR A U.S.

plaints about the bureaucratic inertia of dealing with AID led to the formation of the Overseas Private Investment Corporation (OPIC) in 1969 as an independent government agency in corporate form. The new agency opened for business in 1971.[9]

Soon after OPIC opened its doors in 1971, it was drawn into the brewing controversy over the role of multinational corporations in the developing world.[10] OPIC had inherited AID's portfolio, with approximately twenty-five percent of its total exposure located in Allende's Chile. When Allende came to power, Chile promptly commenced the expropriation of several AID-insured United States investments. These nationalizations resulted in claims against OPIC in excess of $360 million, including claims by the Anaconda Company for $154 million and by International Telephone and Telegraph (ITT) for $95 million.[11] It appeared at the time that, if these claims were proved valid, OPIC would not have the necessary reserves on hand to cover its exposure and would have to seek additional appropriations from Congress.[12]

These developments led to a hard-fought Congressional reassessment of the need for OPIC—a battle that OPIC barely survived. The debate centered on three questions: (1) the extent to which OPIC contributed to the development assistance objectives of the United States, (2) OPIC's financial condition, and (3) whether OPIC's insurance of United States investors increased the likelihood of conflicts between the United States and host countries by politicizing investment disputes.[13] Rather

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OVERSEAS PRIVATE ENTERPRISE DEVELOPMENT CORPORATION: A PROPOSAL (1968), *cited in* Franklin & West, *supra* note 1, at 5. *See also* Griffin, *Transfer of OPIC's Investment Insurance to Private Insurers: Prospects and Proposals*, 7 L. & POL'Y INT'L BUS. 631, 634 (1976).

9. Franklin & West, *supra* note 1, at 5. Senator Jacob Javits had long favored an investment guaranty program which was handled privately. Javits proposed the establishment of a "Peace by Investment Corporation," which would begin as a public corporation, but government participation would be phased out over time. 111 CONG. REC. 13,513-17 (1965). Secretary of State William P. Rogers told Congress that the new program would "focus more sharply than ever on stimulating private enterprise" to invest in less developed countries and that the establishment of OPIC was necessary "in order to carry out this purpose in the most efficient and businesslike fashion." *Hearings on S. 2347 before the Committee on Foreign Relations*, 91st Cong., 1st Sess. 3 (1969). OPIC's enabling statute, Title IV of Part I of the Foreign Assistance Act, 22 U.S.C. §§ 234(c), 235(b), 236 (1982), articulates the purpose intended for OPIC: "to mobilize and facilitate the participation of United States private capital and skills in the economic and social progress of less developed friendly countries and areas, thereby complimenting the development assistance objectives of the United States . . . ." *Id.* § 231.

10. Griffin, *supra* note 8, at 637. *See also* Gilbert, *Expropriations and the Overseas Private Investment Corporation*, 9 L. & POL'Y INT'L BUS. 515 (1977).

11. *Id.* at 539.

12. *Id.* at 516.

13. COMMITTEE ON FOREIGN RELATIONS, THE OVERSEAS PRIVATE INVESTMENT CORPORATIONS AMENDMENT ACT, S. REP. NO. 676, 93d Cong., 2d Sess. 41 (1973), *reprinted in*

than kill the program, however, Congress extended OPIC's authority under the condition that OPIC endeavor to transfer its insurance underwriting to the private sector by 1981.[14]

Between 1974 and 1976, OPIC settled its Chilean claims.[15] With these settlements concern over OPIC's financial condition subsided. OPIC also began an ambitious program to encourage private sector insurers to offer coverage for political risks. By the end of 1976, however, it had become clear that OPIC would not be able to transfer its insurance program to the private sector on the schedule set forth in the 1974 amendments and that continued efforts to do so would simply undermine OPIC's effectiveness.[16] The private market was simply unwilling to assume political risks on anything like the terms and conditions available under OPIC's programs. Moreover, United States investment in the LDCs appeared to be declining during a period of increased need for such investment, while national interest in the diversification of supply sources for critical raw materials increased substantially.[17] These devel-

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1974 U.S. CODE CONG. & ADMIN. NEWS 517 [hereinafter S. REP. NO. 676]. A more plausible conclusion, adopted by a minority of the Senate Foreign Relations Committee (SFRC), was that OPIC insurance tends to depoliticize investment disputes by providing a vehicle for their resolution at a technical level before they are raised to a political level by the operation of the Hickenlooper, Gonzales, and Brook amendments. These amendments require that the United States Government take certain punitive actions against countries that expropriate properties of United States citizens. Foreign Assistance Act, 22 U.S.C. § 2370(e)(2) (1982) (Hickenlooper Ammendment); International Development Association Act, 22 U.S.C. § 284(j) (1982) (Gonzales Ammendment); Foreign Assistance Act, 22 U.S.C. § 2370(i) (1982) (Brook Ammendment).

14. S. REP. NO. 676, *supra* note 13, at 37.

15. *See* H.R. REP. NO. 670, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 102 [hereinafter 1977 H.R. REP.]; *see also OPIC Authorization: Hearings on S. 1771 Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 26 (1977) [hereinafter *1977 Senate Hearings*].

16. The Executive Branch review, studies by the American Bar Association, the General Accounting Office (GAO), and the private insurance industry all agreed that the 1974 "privatization" mandate would not work. *See* 1977 H.R. REP., *supra* note 15, at 15; *1977 Senate Hearings, supra* note 15, at 13, 26. The SFRC further concluded that "lifting the requirement for privatization by a certain date will free OPIC manpower and resources for more innovative efforts in project identification and development." *Id.* at 25. *See also* 1977 H.R. REP., *supra* note 15, at 37 (statement of Rutherford Poats), 104 (statement of Fred Bergsten), 161 (statement of Joseph Griffin, spokesman for the American Bar Association), 195 (statement of Leroy Simon, senior vice-president, Prudential Insurance Company), 247 (statement of J. Kenneth Fasick, GAO spokesman), 241 (statement of Marshall T. Mays, former President of OPIC, who testified that it was too early to abandon the privatization experiment); Griffin, *supra* note 8, at 631, 657-99 (reprinting the transcript of an April 21, 1976 discussion, "New Developments in Insuring Overseas Investments Against Political Risks," sponsored in Washington, D.C., by the American Bar Association Subcommittee on Insuring Overseas Investment).

17. *See 1977 Senate Hearings, supra* note 15, at 20 (statement of Rutherford Poats).

opments led to an extensive examination early in the Carter Administration of OPIC's functions and policy. The cabinet level Economic Policy Group found that OPIC programs significantly contributed to the implementation of United States foreign economic development policies and recommended that OPIC be continued.[18] This view in effect has been Congressionally ratified by OPIC's 1978, 1981 and 1985 reauthorizations.

II. OPIC PROGRAMS

OPIC's mission, as defined in the Foreign Assistance Act,[19] is to "mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States . . . ."[20] OPIC accomplishes this mission by encouraging interested private investors to invest in developing countries. Obviously OPIC cannot create investors willing to invest in the poorest and riskiest countries in the world. The program is market-driven; it is dependent upon the existence and investors' perceptions of commercially viable opportunities for investments in developing countries. It cannot create opportunities where none exist. The program seeks to equalize some of the costs and risks of doing business in developing countries with those of doing business in the more developed countries and, thereby, seeks to encourage selected United States private investment in countries where perceived political risks otherwise might appear prohibitive.[21] For almost forty years now, this program has proved that reasonably priced, comprehensive insurance against the major political risks associated with investing abroad can be an effective, low-cost public policy tool that can encourage a significantly increased flow of private investment to selected countries.[22]

OPIC operates two basic programs. The first, and by far the largest, is OPIC's political risk insurance program, which covers the political risks of expropriation or confiscation; currency inconvertibility, or transfer risk; and various kinds of risks associated with political violence.

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18. *Id.* at 12, 15, 20.

19. 22 U.S.C. § 2191 (1982).

20. *Id.*

21. *See Extension and Revision of OPIC Programs, Hearings before the Subcomm. on Int'l Relations,* 95th Cong., 1st Sess. 15 (statement of Rutherford Poats), 99 (statement of C. Fred Bergsten), 222 (statement of Prof. Stephen J. Kobrin, Sloan School of Management, Massachusetts Institute of Technology), *cited in* Franklin & West, *supra* note 1, at 6.

22. *Id.*

This Article focuses on the insurance program because it is by far the larger of the two, but it is important to note that OPIC also has a finance program. In effect, OPIC is a bank as well as an insurance company.

Under its finance program OPIC can participate as a medium to long-term project lender. For smaller projects, involving small businesses, OPIC can participate as a direct lender. For larger projects, and larger investors, OPIC can faciliate commercial lending by providing investment guarantees for commercial bank loans.[23] In this sense, OPIC functions much like the International Finance Corporation under the World Bank. While the OPIC finance program is a very important component of OPIC and is worthy of an article in itself, it is beyond the scope of this Article, which will focus on OPIC's political insurance program. It should be noted that, as a lender or guarantor, OPIC assumes both commercial and political risks. As an insurer, however, its coverage is limited to political risks.

A. OPIC's Political Risk Insurance Program

OPIC's political risk insurance program covers the major political risks associated with investing abroad.

1. Expropriation

Expropriation is a deliberate act by a host government to deprive an investor of the value or the control of his or her investment.[24] It is essen-

23. OPIC, INVESTMENT FINANCE HANDBOOK (1985).

24. Article IV of OPIC's standard contract (Form 234 KGT 12-85) defines "expropriation" as the following:

> 4.01 *Total Expropriation.* Compensation is payable for total expropriation (§ 5.01), subject to the exclusion (§ 4.03) and limitations (§ 5.04), if an act or series of acts satisfies all of the following requirements:
>
> (a) the acts are attributable to a foreign governing authority which is in *de facto* control of the part of the country in which the project is located;
>
> (b) the acts are violations of international law (without regard to the availability of local remedies) or material breaches of local law;
>
> (c) the acts directly deprive the Investor of fundamental rights in the insured investment (Rights are "fundamental" if without them the Investor is substantially deprived of the benefits of the investment.); and
>
> (d) the violations of law are not remedied (§ 9.01.9) and the expropriatory effect continues for one year.
>
> 4.02 *Expropriation of Funds.* Compensation is payable for an expropriation of funds that constitutes a return of the insured investment or earnings on the insured investment (§ 5.02) if an act or series of acts (a) satisfies the governmental action, illegality and duration requirements (§ 4.01(a), (b), and (d)); and
>
> (b) directly results in preventing the Investor from
>
> (1) repatriating the funds; and

tially a "taking" by a foreign government. Obviously, a nationalization or taking is a sovereign act. It is legal under international law if: (1) it is for a public purpose, (2) it is not discriminatory, (3) it is not accompanied by a "denial of justice"—in other words, it is accomplished according to legal procedures, including a right to contest the action—and (4) it is accompanied by "prompt, adequate and effective compensation."[25]

This last phrase is a reference to the so-called "Hull Doctrine," which remains the official United States position on the compensation requirement under international law for nationalizations. This standard is controversial with some developing countries and has often been challenged,[26] most recently in the Iranian claims cases before arbitrators in the Hague.[27] The Iranians had argued that the correct standard was "appropriate" compensation, a standard under which the value of an investment could be offset by such factors as "excess profits" earned by the venture, perceived damage to the host country, and various other kinds of epistemological notions.[28] They further argued that evidence of past settlements should be permitted to prove the value of investments.[29] For the most part, the arbitrators in the Hague have not been persuaded by these arguments.[30]

Perhaps equally important, the American Law Institute has recently redrafted § 712 of the Restatement of Foreign Relations Law of the

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(2) effectively controlling the funds in the country in which the project is located.

25. RESTATEMENT FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1)-(2)(Revised, 1986) [hereinafter FOREIGN RELATIONS LAW]. The quoted phrase refers to the Hull Doctrine, first articulated in 1938 by Secretary of State Hull in an exchange with the Minister of Foreign Relations of Mexico. Secretary Hull argued that the property of aliens was protected by an international standard under which expropriation must be accompanied by "adequate, effective, and prompt payment" to the foreign national. 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-61 (1942).

26. *See* Libyan American Oil Co. v. Libyan Arab Republic (1977), 20 I.L.M. 1, 86 (1985) (arbitrator applied measure of "equitable compensation," using "prompt, adequate and effective compensation" as maximum standard of relief); Kuwait v. American Independent Oil Co. (1982), 20 I.L.M. 976, 1033 (1982) (arbitrator applied "appropriate compensation" standard, considering all the circumstances).

27. *Compare* American International Group, Inc. v. Islamic Republic of Iran (1983), 23 I.L.M. 1, 8-12 (1984) ("value of the property taken" standard of relief applied) *with* concurring opinions of the United States judges, *id.* at 14 (calling for application of "just compensation" standard cited in Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 900, T.I.A.S. No. 3853).

28. FOREIGN RELATIONS LAW § 712, VII (2), *supra* note 25, at 523 (citing *American International Group*, 23 I.L.M. at 8-12).

29. *American International Group*, 23 I.L.M. 1.

30. *Id.*; Starrett Housing Corp v. Islamic Republic of Iran (1983), 23 I.L.M. 1090, 1117 (1984).

United States, which deals with this issue.[31] Early drafts of the law compromised the Hull standard by stating that "just compensation" *ordinarily* would be equal to the value of the investment. By implication, "just compensation" would not be equal to the value of the investment in some circumstances. Moreover, the accompanying comments raised questions concerning not only the compensation requirement, but also the definition of so-called "creeping expropriation" by injecting a notion of *intent* into the definition. In other words, the comments raised the possibility that the party seeking compensation for an expropriation might have to prove that the government had intended to expropriate. This standard would be very difficult, perhaps impossible, to meet in the context of a "creeping expropriation" case. For this reason, OPIC was keenly interested in § 712, and commented extensively to the American Law Institute (ALI) on the early drafts. Publication of the final version is expected in the near future.

Initially, expropriation coverage was OPIC's hottest-selling item. There have been, however, relatively few expropriation claims in recent years, with the notable exception of the claims which arose from the Iranian Revolution. Even fewer of the more recent expropriation claims are for outright nationalizations. Instead, the more recent claims tend to be for "creeping expropriation," or expropriation through a series of acts that individually might be seen as administrative measures or general, health, safety, or welfare measures undertaken by the host government[32]

This trend appears attributable to at least three factors. First, the majority of LDC governments are busy competing with each other to attract foreign investment and are reluctant to take any actions that would raise concerns about the climate for foreign investment in their countries. Second, LDC governments have become much more sophisticated and are aware that many tools are available to accomplish their political or economic objectives short of outright nationalization. Outright nationalization can have undesirable repercussions for a government's standing in the international financial system. Third, international transactions have become increasingly complex and varied. International investments no longer consist primarily of consignment agreements with host governments for extraction of minerals or other resources. Rather, today's international investors tend to form many dif-

31. FOREIGN RELATIONS LAW, *supra* note 25.

32. The term "de facto expropriation" perhaps more accurately describes this form of nationalization than the more colloquial term "creeping expropriation," which has gained wide usage.

ferent and complex kinds of cooperative relationships with host governments, parastatal entities, or private host country nationals.

In contrast to overt nationalization, de facto, or creeping, expropriation can be very difficult to recognize. Basically, de facto or creeping expropriation can be defined as any act, or series of acts, for which the state is responsible, which are illegal under domestic or international law, and which have a *substantial enough* adverse effect on either the enterprise or the investor's rights under the enterprise.[33]

The obvious question posed by this definition is, how much is "substantial enough?" A broad range of governmental acts—moving along a spectrum from fairly direct forms of intervention to various subtle forms of interference—have confronted OPIC. In reviewing a claim, OPIC must consider what has happened and its effect on the entire investment. Under its insurance policies, OPIC is sometimes able to avoid this difficult question of precisely how much interference is enough because its standard contract does not permit claims for partial expropriation or diminished value of an investment due to some element of creeping expropriation.[34] An investor must be willing to give up his or her investment entirely.[35] In other words, OPIC attempts to let the investor decide, at least initially, how much interference is substantial enough.

A hypothetical example, based on an actual situation, may help illustrate the difficulty of deciding precisely at what point an expropriation has taken place. OPIC insured a joint venture to catch, process, and freeze seafood for export. Forty-nine percent of the equity was held by a United States investor, with local nationals holding the remaining fifty-one percent. OPIC officers thought that this structure was an advantage at the time of the investment because the local investors were well-connected with the government and therefore could be helpful in acquiring the necessary government approvals, licenses, and permits. A military coup occurred, however, and the new government was hostile both to the American investors and to the local partners, precisely because the Americans and the local investors had been close to the former govern-

33. *See generally* Weston, *"Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103 (1975); Vagts, *Coercion and Foreign Investment Arrangements*, 72 AM. J. INT'L L. 17 (1978). OPIC's enabling legislation defines expropriation as "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor . . . where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project." 22 U.S.C. § 2198(b) (1982).

34. OPIC Form Contract 234 KGT 12-85 ("plain language contract"), arts. IV, V, *reprinted in* 51 Fed. Reg. 17,3438 (1986).

35. *Id.*

ment. The government then began a series of acts, some of which could be characterized as regulatory measures, which had the effect of increasingly restricting the investment. First, the expatriate manager and his family were threatened with physical harm; they packed up and left. Second, an expatriate refrigeration expert, whose services were vital, was denied the right to extend his visa; he was forced to leave. Third, government authorities interfered with the joint venture's fishing rights. Fourth, harbor authorities refused to allow ships dealing with the joint venture to use port facilities, and it became very difficult to export. Finally, when the investor had been reduced to flying out a single load of seafood per day on a small company plane, the government refused to permit the joint venture to fly its plane unless it was accompanied by a government-approved pilot and "seafood inspector." This extra passenger on the light plane had the effect of displacing his weight in seafood. This requirement created a serious problem because the person chosen weighed approximately 400 pounds and, apparently, had been selected because he was the heaviest member of the armed forces. Moreover, as a "pilot," he had a record of having crashed several airplanes. In any case, the investor filed a claim, and OPIC paid it.

Obviously, this is a fairly extreme example, but it illustrates the difficulty in determining precisely when an expropriation has taken place and the difficulty of proving, at any point along a continuum of interferences, that the government intends to expropriate, rather than simply to regulate, the investment.

2. Inconvertibility Coverage

OPIC can insure the right to convert local currency into dollars. Convertibility into dollars is necessary in order to remit dividends or profits, to repay dollar-denominated loans, and to meet other hard currency obligations. Under this form of coverage, OPIC essentially insures an existing legal right to convert. The procedure for converting currency varies somewhat from country to country. Where there is no legal right to convert, as in China, OPIC is not able to offer this form of coverage. Given a legal right to convert, however, OPIC can insure that right against a denial or adverse change either through active blockage, where the government changes the rules or refuses to honor a request to convert, or through passive blockage, where the investor goes through the prescribed procedures, yet cannot convert the earnings.[36] After a claim is ripe and there has been no payment for the time prescribed in the

36. *Id.* arts. II, III.

policy,[37] OPIC "buys" the local currency for dollars at the prevailing rate and "sells" it to the United States embassy in the country for local operating expenses. The embassy then credits OPIC's account.[38] This arrangement effectively allows OPIC to circumvent the host country's central banking system and convert currency when the central bank will not, or cannot, convert it.

It should be emphasized that this form of coverage insures against inconvertibility, not devaluation.[39] OPIC buys and sells currency at the prevailing rates. It bears the devaluation risk only from the time it acquires the currency until it disposes of it through the United States embassy. Because OPIC has this ability to dispose of currency throughout United States Government channels, its salvage rate is very high for this kind of coverage. There are occasions, however, when this mechanism does not work smoothly, perhaps because diplomatic relations have been severed, or because it is not possible to use currency quickly enough to avoid a devaluation loss. In such situations, OPIC has the authority to arrange for swaps on commercial terms.[40] This substitute is, however, less than satisfactory, as such swaps usually entail disposal of the local currency at a significant discount and payment of substantial commissions.

Not surprisingly, given the current Third World debt crisis, inconvertibility is currently OPIC's most sought-after form of coverage and the one that produces the most claims.[41] Despite OPIC's unique salvage ability, it is simply too risky to offer this form of coverage in some countries. Even in countries that are experiencing, or can be expected to experience, severe liquidity problems, however, it may be possible to use commercial devices (such as offshore accounts) or underwriting tools (such as caps on the maximum amount that can be presented for conver-

37. *Id.*

38. In this way, OPIC has recovered, or anticipates recovery of, 94% of the amount it paid out in inconvertibility claims during fiscal 1985. OPIC, 1985 ANNUAL REPORT 23 (1986) [hereinafter OPIC ANNUAL REPORT] ($15,751,369 anticipated recovery, $16,819,131 paid out).

39. OPIC Form Contract 234 KGT 12-85, *supra* note 34, art. II. Devaluation is considered a commercial risk. *See* A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 103 (1962) (OPIC insurance covers "only nonbusiness risks and not those normally associated with business ventures, such as devaluation"); *but see* M. NEUMANN, THE UNITED STATES INVESTMENT GUARANTY PROGRAM AND PRIVATE FOREIGN INVESTMENT 65 (1959) (devaluation seems to be a political risk appropriate for public guaranty coverage).

40. Foreign Assistance Act, 22 U.S.C. §§ 234(c), 235(b), 236 (1982); *see also* Mutual Security Act of 1954 68 Stat. 832 (1954) (as amended by the proposed Mutual Security Act of 1959, 73 Stat. 246 (1959) (codified at 22 U.S.C. § 1925 and repealed).

41. During fiscal year 1985, OPIC settled 22 inconvertibility claims totalling $16,819,131. OPIC ANNUAL REPORT, *supra* note 38, at 23.

sion in any given year). Through such devices, some unacceptable risks can be converted into insurable ones.

3. Political Violence

The term "political violence" is a euphemism for various kinds of risks associated with wars, revolutions, insurrections, civil strife, and terrorism. Unlike expropriation or inconvertibility coverage, this risk is generally outside the control of the host government. By the same token, in the event of a claim the prospects for salvage are much weaker for this kind of coverage than for either expropriation or inconvertibility claims. One cannot pursue one's subrogation rights against host governments that cannot control insurgent violence. Consequently, for political violence coverage OPIC assesses risk on a somewhat different basis. OPIC does not significantly vary its rates from one country to another for expropriation or inconvertibility insurance, despite the fact that stability may differ from one government to another.[42] This is partly because OPIC is an incentive program, and partly because its policies typically extend for as long as twenty years. OPIC cannot predict what will happen in any country over such a long period of time, so it controls its exposure in other ways, using such underwriting tools as limiting total exposure to no more than ten percent in any given country. This is a very simple and obvious risk-spreading rule. Given that OPIC, in essence, is betting on the political and economic stability of governments, this risk-limiting role works well. In the case of political violence coverage, however, OPIC must look much more closely at conditions in the host country, as well as conditions affecting the project itself.

For example, if OPIC were asked to insure an oil pipeline, its staff would begin by examining the country in which the pipeline was to be built. More specifically, OPIC would look at the region of the country, the level of political violence that had taken place there historically, and the potential for friction among various political, religious, and socioeconomic groups. It would look to such variables as the existence in the area of active guerrilla groups, the government's ability to control violence, and the level of police or military presence. OPIC might also examine the topography around the project to determine whether troop movements or guerrilla attacks would be relatively easy or relatively

42. The base rate for all countries is the same. Rates for a given project may vary somewhat based on OPIC's perception of the risk associated with the project. These variations are relatively small—generally no more than 50% over the base rate. Of course, OPIC will decline to insure a project that it believes is a bad risk, or will agree to insure it only on the condition that the investor agrees to alter it to incorporate changes designed to manage perceived risks.

more difficult to negotiate. OPIC would also study the characteristics of the project itself. For example, would the pipeline be buried or built on the surface and, if buried, how deep? OPIC would then consider the pumping stations and assess the redundancy of capacity among the stations. In other words, if one station were damaged, OPIC would want to know the economic effect on the project in terms of reduced oil flow. Finally, OPIC would want to know what provisions the company had made for repair. It might well require as a condition of insurance that the company maintain a spare parts inventory at a certain level, or even maintain an entire pumping station in parts that could be transported quickly by helicopter to replace a damaged station and avoid costly down time.

In one situation, OPIC agreed to assist a project involving a transpacific fiber optic communications cable to the Philippines, as well as other islands, several months before the fall of the Marcos regime, a time when investors were not flocking to the Philippines. Despite well-publicized political unrest in the Philippines, OPIC accepted exposure because the circumstances of the project appeared to make it an acceptable risk. Most of this investment would rest on the ocean floor, where it would not be vulnerable to the usual dangers of political violence. Onshore facilities would be limited to a few microwave relay towers, which are relatively inexpensive and can be easily replaced. Moreover, the financial structure of the project was such that the income from the facility would be paid into accounts in the United States, and then the American corporate parties would pay the Philippine companies. The fact that the dollars were captured here made the entity a much less tempting target for expropriation. Finally, it had been OPIC's experience that even new revolutionary governments want to communicate with the outside world. While land-based telecommunications facilities have been relatively high on the list of potential candidates for nationalization, as with ITT in Chile, they have not generally been high on the list of potential targets for political violence. Thus, interference with operations through damage to the onshore facilities seemed unlikely. Fortunately for all, the peaceful change of governments in the Philippines has significantly improved investors' perceptions of the Philippines in the interim.

B. The Record: How OPIC's Programs Have Fared

OPIC began operations in 1971 with a very large exposure in Chile inherited from AID. It also began with relatively few resources. Nevertheless, OPIC survived that initial period and, in the fifteen years since its doors have been open, has paid approximately $465 million in claims.[43] In addition, it has repaid its original "seed" money to the Treasury ($106 million), and has accumulated reserves of slightly more than one billion dollars to back its insurance and loan guaranty programs.[44] In the process, OPIC has paid or settled approximately 220 claims.[45] To date, in the history of the program, only about twenty claims have been denied—only about a dozen by OPIC.[46] Of these, only six claims have been submitted to arbitration. The record thus establishes, first, that OPIC has remained financially viable and, second, that it has done so while paying more than ninety percent of its claims without dispute. This success can be attributed in part to OPIC's underwriting and legal staff, and in part to the unique advantages OPIC has as an insurance company.

First, it is important to note that OPIC is a United States Government agency backed by the full faith and credit of the United States. While the importance of this government guaranty is difficult to quantify, there is no doubt that it is important. Equally important are OPIC's salvage abilities. OPIC has had phenomenal success in recovering money paid to claimants by arranging three-way settlements with investors and host governments, by guaranteeing host government obligations, by pursuing subrogated rights against the government, and, as described above,[47] by disposing of locally blocked currency. In this respect, OPIC has some important advantages that private insurers do not enjoy.

By statute, OPIC may operate only in those countries with which it has "suitable arrangements"—usually bilateral investment agreements.[48] These international executive agreements describe the terms in which OPIC programs may operate in any country. They provide that OPIC may be subrogated to the rights of its insurers when it pays their claims.[49] They also provide for international arbitration of investment

43. OPIC Report on Form A.II.A, (Sept. 30, 1986).

44. OPIC ANNUAL REPORT, *supra* note 38, at 2.

45. *Id.*

46. The others were denied before OPIC's creation in 1971.

47. *See supra* note 38 and accompanying text.

48. 22 U.S.C. § 2191 (Supp. 1986) (OPIC Amendments Act of 1985).

49. OPIC Form Contract 234 KGT 12-85, § 8.02 provides for assignment to OPIC of the insured's claims under the following conditions:

> *Assignment to OPIC.* Within sixty days after OPIC notifies the Investor of the amount of compensation OPIC will pay under expropriation or political violence coverage, and prior to payment, the Investor shall transfer to OPIC all interests attributable to the insured investment (§ 4.01) or funds (§ 4.02) as of the date the expropriatory effect commences, including claims arising out of the expropriation, or claims arising out of the loss due to political violence (§ 6.01). The Investor shall transfer the interests and claims free and clear of, and shall agree to indemnify OPIC

disputes in the event that OPIC and the host government are unable to reach a negotiated settlement.[50] While OPIC has never had to resort to international arbitration under these agreements (the only international arbitrations have been with Iran under the special arrangement setting up the Iranian Claims Tribunal), there is no doubt that the availability of

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against, claims, defenses, counterclaims, rights or setoff and other encumbrances (except defenses relating to the expropriation).

In connection with an inconvertibility claim, immediately upon receipt of instructions from OPIC, the Investor shall deliver the local currency to OPIC by draft subject to collection (or, at OPIC's option, in cash).

OPIC may decline all or any portion of the Investor's interests or claims; if so, the Investor's right to compensation shall be affected only as provided in § 5.03.4(b).

Bilateral agreements with the host countries provide that OPIC has the right to be subrogated to the claims of the Insured in that country. These provisions generally are in the following form:

ARTICLE 3

(a) If the issuer makes payment to any party under Coverage, the Government of (Name of Country) shall, subject to the provisions of Article 4 hereof, recognize the transfer to the issuer of any currency, credits, assets, or investment on account of which payment under such Coverage is made as well as the succession of the Issuer to any right, title, claim, privilege, or cause of action existing, or which may arise, in connection therewith.

(b) The Issuer shall assert no greater rights than those of the transferring party under Coverage with respect to any interests transferred or succeeded to under this Article. Nothing in this Agreement shall limit the right of the Government of the United States of America to assert a claim under international law in its sovereign capacity, as distinct from any rights it may have as Issuer.

(c) The issuance of Coverage outside of (Name of Country) with respect to a project or activity in (Name of Country) shall not subject the Issuer to regulation under the laws of (Name of Country) applicable to insurance or financial organizations.

(d) Funds introduced or acquired in (Name of Country) or withdrawn from (Name of Country) by the Issuer shall be exempt from all taxes upon income, real property or sales, from customs duties, and from any other similar taxes or levies in (Name of Country).

ARTICLE 4

To the extent that the laws of (Name of Country) partially or wholly invalidate or prohibit the acquisition from a party under Coverage of any interest in any property within the territory of (Name of Country) by the Issuer, the Government of (Name of Country) shall permit such party and the Issuer to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of (Name of Country).

See also Hearings on S. 1983 Before the Senate Committee on Foreign Relations, 87th Cong., 1st Sess. 282 (1961).

50. Bilateral agreements with host countries provide that:

If at the end of three months following the request for negotiations the two Governments have not resolved the dispute by agreement, the dispute, including the question of whether such dispute presents a question of public international law, shall be submitted, at the initiative of either Government, to an arbitral tribunal for resolution in accordance with Article 6(b).

international arbitration has been a factor encouraging negotiated settlements.

Finally, the fact that OPIC is a Government agency may have been helpful in at least two ways. First, some investors may seek OPIC insurance in the hope that the aura of United States Government involvement may assist them in dealing with a host country government. Second, that same aura of Government involvement may serve, in some cases, as a disincentive to a host country interfering with the investment. Again, it is difficult to know precisely how important these factors have been in contributing to OPIC's success, but they are important.

In addition to these factors, OPIC's growth and success has been aided by the LDCs themselves, which have begun to seek foreign investment as a source of capital for development. Whereas OPIC operated in relatively few countries back in the early 1970s, it now has active programs in over 100 countries.[51] The increase in the number of countries served by OPIC is a testament to the increasing interest by developing countries in attracting United States investment. For example, in 1980 OPIC and China signed an agreement permitting OPIC to operate there. OPIC assisted the first United States investors in China in late 1982 and early 1983. In less than four years, OPIC has already assisted twenty-four projects in China, and many more are on the way.[52] Latin America, an area strategically vital to the United States, espoused, until recently, a strong anti-investment ideology. Resentment about past colonial abuses and fervent nationalism had produced a climate hostile to foreign investment. This climate was embodied in the investment codes of these countries, particularly in those of the members of the Andean Pact.[53] In the past few years, however, OPIC has signed new agreements with Uruguay (1982), Chile (1983), Ecuador (1984), Colombia (1985), and Bolivia and Argentina (1986). OPIC is currently discussing potential agreements with Venezuela, Mexico, and others.

Another very significant shift has taken place in India, where the hostile investment climate of the 1960s and 1970s began to warm to for-

51. OPIC ANNUAL REPORT, *supra* note 38, at 6.

52. *See generally* Shanks, *Investment Protection in China-Overseas Private Investment Corporation Political Risk Insurance,* in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 457 (E. Theroux ed. 1985).

53. Constitutional or statutory provisions in Latin American countries sometimes bar ownership of real property by United States entities. Similarly, the Calvo doctrine is considered by many such Countries to inhibit them from recognizing U.S. subrogation to claims, or agreement to negotiate and arbitrate such claims.

Hearings on S. 1983 Before the Senate Committee on Foreign Relations, 87th Cong., 1st Sess. 282 (1961).

eign investors in the closing days of Indira Gandhi's leadership. Under Rajiv Gandhi, this change has accelerated dramatically.[54] Although India still has a strong, centrally-managed economy, the hostility toward foreign investment is gone, at least from the bureaucracy's upper levels. Perhaps more importantly, India has recently deregulated twenty-five industries and now encourages foreign investment in a number of economic sectors.[55] The significance of this change is understandable only when one recognizes that, until recently, every Indian industry was burdened with regulations which controlled entry, licensing, changes in production, expansions, marketing, distribution, and virtually every other facet of doing business.[56] Now India has done away with many of these cumbersome restrictions and protectionist practices. Indeed, the government now permits one hundred percent foreign ownership in certain sectors and is attempting to move toward a more market-oriented system.[57]

III. LOOKING AHEAD

One would think that a program that assists United States investors, encourages exports, helps development in the world's poorest countries, and makes money—all at no cost to the American taxpayer—would have no trouble being reauthorized by Congress. Unfortunately, this has not always been the case. In past reauthorizations, OPIC has been burdened with various requirements that affect its ability to operate in a business-like manner. The most recent reauthorization was no exception. While a detailed discussion of the 1985 OPIC Amendments Act[58] is beyond the scope of this Article, a brief discussion of those changes is in order.

In recent reauthorizations, including the one just completed, organized labor has consistently opposed OPIC, arguing that OPIC aids and abets the export of jobs. There is no evidence, and none has ever been presented, that OPIC has ever supported any projects involving "runaway" plants, or that any OPIC project has resulted in a loss of jobs in the United States.[59] Unfortunately, it is easy for OPIC's critics to charge

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54. *See Springboard for Growth,* Financial Times (London), June 3, 1985, § III, at 1; INDIA INTERNATIONAL INC., PROCEEDINGS OF THE WASHINGTON SEMINAR ON UNITED STATES-INDIA BUSINESS OPPORTUNITIES: FUTURE DIRECTIONS (Apr. 18-19, 1985).

55. *See News on Investment by Non-Resident Indians,* INDO-AMERICAN BUSINESS TIMES, Apr. 1985, at 29-30.

56. *See* PRICE-WATERHOUSE, DOING BUSINESS IN INDIA (1980).

57. *See India Enters into New Economic Era,* INDO-AMERICAN BUSINESS TIMES, Apr. 1985, at 25.

58. Overseas Private Investment Corporation Act, 22 U.S.C. § 2191 (Supp. 1986) (OPIC Amendments Act of 1985).

59. Responding to the same concerns, Senator Metzenbaum requested that the GAO con-

that the agency has supported a plant in some developing country while some plant in the same industry, but located in the United States, has been shut down, thus attempting to demonstrate that OPIC has abetted in the transfer of jobs overseas. Despite considerable effort, no instance has yet been substantiated in which OPIC has assisted a "runaway" plant. Nevertheless, the belief that OPIC must somehow aid in the export of jobs is easy, but incorrect. Economic data prove conclusively that OPIC's activities result in a substantial *increase* in employment because OPIC encourages the export from the United States of production inputs. Indeed, it has been estimated that one-third of all United States exports are associated with United States investments overseas.[60] Unfortunately, these statistics are subtle and difficult to explain, especially to busy politicians, who may have political incentives not to be persuaded by the data.

Intense lobbying by labor has been successful in adding several new burdens and restrictions to the OPIC legislation. Specifically, Congress has added a provision which prohibits OPIC from assisting investments in countries which are not "taking steps to adopt and implement so-called internationally recognized worker rights."[61] These rights include the right to organize, to bargain collectively, and to strike. The provision also prevents OPIC from dealing with countries which do not have laws that prohibit child or forced labor, establish maximum hours and minimum wages, and guarantee safe working conditions.

OPIC fully supports the spread of enlightened labor practices. In

duct an audit of OPIC's projects in so-called "sensitive industries" to determine their effect on United States employment. CONG. REC. S15670 (daily ed. Nov. 14, 1985). A similar GAO study after the last reauthorization found no evidence of harm to United States employment. Preliminary indications are that the current study also has failed to turn up a "runaway" plant, despite considerable effort and expense. The House added yet another comprehensive study. This study of all OPIC projects currently existing must be completed by OPIC by the end of 1987. The legislation also required OPIC to report to Congress additional economic information concerning the effects of its projects on United States employment. OPIC Amendments Act of 1985 § 13(c)(1). OPIC has nothing to hide on this score and is very proud of its record of *creating* jobs in the United States through promoting United States exports, as well as in host countries. By OPIC's estimates, using the same methodology the Commerce Department uses to forecast employment, OPIC has helped create approximately 27,000 person-years of employment in the United States over the past four years, approximately equal to the number of jobs created in host countries through United States exports to OPIC assisted projects.

60. *Review of Activities of the Overseas Private Investment Corp: Hearings Before the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs, House of Representatives,* 96th Cong. 2d Sess. 40 (1980); OPIC, DEVELOPMENT REPORT 19 (1980); *OPIC Amendments Act of 1977,* Report, 95th Cong. 1st Sess. 6, 12 (1977).

61. Overseas Private Investment Corporation Act, 22 U.S.C. 2191a (a)(1) (Supp. 1986) (OPIC Amendments Act of 1985).

testimony before the House and Senate, however, OPIC questioned the wisdom of conditioning development assistance upon a host government's adoption of labor standards similar to our own.[62] The wisdom of this approach seemed especially questionable, since OPIC does not assist or deal directly with host governments, but rather works with private investors. Therefore, it was doubtful that a decision by OPIC not to support a project in a country which has not adopted "internationally recognized worker rights" could compel the host government to implement such rights. Indeed, the host government very likely would never even learn that a project had not gone forward, nor the reason why OPIC had refused to assist it. Arguably, the effect of the amendment more likely would be to punish the American investor, rather than the host government.

Fortunately, Congress softened the language of the amendment as originally offered, adding the "taking steps" language and providing for a presidential waiver.[63] The colloquy surrounding the addition of this language makes it clear that Congress intends the requirement to be applied reasonably and flexibly, taking into account the level of development existing in the host country.[64]

In order to comply with this provision, the State Department has added a new list of rights to those it already considers in its annual "Human Rights Report." The first such report containing these rights has recently been completed,[65] and OPIC is now in the process of reviewing it. An interagency process has been established for those countries benefitted by the Generalized System of Preferences (GSP),[66] and OPIC will abide by the interagency group's determination with respect to any country. For non-GSP countries, OPIC will make its own determination in consultation with Congress and relevant Executive Branch agencies.

62. *Reauthorization of the Overseas Private Investment Corporation, Hearings before the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee*, 99th Cong., 1st Sess. 253-55 (1985) (statement of Craig A. Nalen, President and Chief Executive Officer, OPIC).

63. Overseas Private Investment Corporation Act, 22 U.S.C. § 2191a (a)(1) (Supp. 1986) (OPIC Amendments Act of 1985).

64. *Hearing Before the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee*, 99th Cong., 2d Sess. 279 (1985).

65. *Country Reports on Human Rights Practices for 1985, Report Submitted to the Committee on Foregn Affairs of the House of Representatives and the Committee on Foreign Relations of the United States Senate by the Department of State*, 99th Cong., 2d Sess. (1986).

66. The GSP permits certain less-developed countries to receive more favorable tariff treatment. *See* Trade Act of 1974, 19 U.S.C. § 2462(a)(4). This favorable treatment will be suspended for countries which the interagency group determines are not taking steps to implement internationally-recognized worker rights.

A second major area of concern in Congress was the environmental impact of investments supported by OPIC. While OPIC did not insure or otherwise assist Union Carbide's investment in Bhopal, in the wake of that tragedy OPIC had taken the initiative to revise and update its environmental policies. Nevertheless, Congress added an environmental provision to the OPIC statute which essentially incorporated much of OPIC's current evaluation practice and added a notification provision to host country governments for environmentally sensitive projects.[67] OPIC does not anticipate that the notification requirement will have a substantial adverse business impact on its operations.

The Administration's Fiscal Year 1987 Budget proposed that OPIC be "privatized" by the end of 1988.[68] OPIC's management has been working with the Office of Management and Budget (OMB) and other relevant agencies to develop a plan to privatize OPIC, and has retained an investment bank and other expert services. Congress has previously considered privatization for OPIC. A serious attempt followed OPIC's 1974 reauthorization,[69] but was abandoned in the 1978 reauthorization because the private sector was unwilling or unable to provide the kinds of service that OPIC provides.[70]

The Reagan Administration has emphasized the importance of pri-

67. Overseas Private Investment Corporation Act, 22 U.S.C. § 2191 (Supp. 1985) (OPIC Amendments Act of 1985).

68. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1987, 3-13, 5-21 (1986). *See generally the Reagan Budget: Rationale for Dropping Programs: Key Programs to Be Eliminated and the Reasons for Doing So*, N.Y. Times, Feb. 1986, § B, at 14, col. 1; *The President's Spending Cuts*, Washington Post, Feb. 13, 1986, § 1 (Editorial), at E2; *Budget's Impact on Banks*, AM. BANKER, Feb. 10, 1986, News Monday section, at 13.

69. *See* OPIC Conference Reports, H.R. Rep. No. 1233, 93d Cong., 2d Sess. (1974).

70. Both the Senate and the House recommended repeal of the privatization mandate contained in the OPIC's 1974 legislation. The House report concluded:

> It is not clearly in the realm of possibility for the private sector to take over the entire range of OPIC's programs. The private insurance companies have refused to participate at all in OPIC's war risks and have been reluctant to become heavily involved in inconvertibility risks. And although private insurers have been more willing to share the risk of expropriation, they say they want continued OPIC participation, in expropriation risks of at least 15-25 percent and continued OPIC reinsurance for catastrophic loss. The private insurers also want OPIC to continue to manage the portfolio, particularly because of its experience and expertise in investment disputes settlement. Furthermore, they are unwilling to make long-term insurance commitments.

HOUSE COMM. ON INTERNATIONAL RELATIONS, OVERSEAS PRIVATE INVESTMENT CORPORATION AMENDMENTS ACT OF 1977 H.R. Rep. No. 670, 95th Cong., 1st Sess. 17 (1977). The Senate Committee based its conclusions on:

> 1) private insurers' reluctance to commit significantly to a war insurance venture that was not based on actuarial principles; 2) their relative lack of familiarity with

vate sector investment in the development process.[71] The Baker Initiative, announced at the 1985 meeting of the World Bank in Seoul, Korea, outlined a development strategy emphasizing the importance of encouraging increased foreign direct investment in lieu of additional debt.[72] Investment guarantees and political risk coverage of the kind offered by OPIC have proven to be a relatively low cost and effective mechanism for encouraging private sector investment in developing countries. It is for this reason that the Administration supported United States participation in the new Multilateral Investment Guaranty Agency (MIGA), now being set up under the auspices of the World Bank.[73] OPIC has proven to be an efficient development and foreign policy tool to enhance private sector growth in developing countries. Whatever form OMB's proposed privatization of OPIC may take, it is likely to confront a strong consensus among the foreign policy and development community that the United States should not sacrifice the foreign policy interests currently served by OPIC, especially the encouragement of the United States private investment in the LDCs.[74]

> political risk insurance; 3) their belief that OPIC has advantages as an underwriter and claims salvager which private companies did not possess.

UNITED STATES SENATE COMM. ON FOREIGN RELATIONS, OVERSEAS PRIVATE INVESTMENT CORPORATION AMENDMENTS ACT, S. Rep. No 505, 95th Cong., 1st Sess. 14 (1977).

71. *See, e.g.*, J. William Middendorf II, *Free Enterprise: Key to Latin American Economic Revival*, U.S. Dept. of State, Current Policy No. 692 (Feb. 22, 1985); Secretarty of State George P. Schultz, *Beyond the Debt Problem: The Path to Prosperity in Latin America*, U.S. Dept. of State, Current Policy No. 768 (Dec. 1, 1985).

72. Statement of the Honorable James A. Baker III, Secretary of the Treasury of the United States before the Joint Annual Meeting of the International Monetary Fund and the World Bank at Seoul, Korea (October 8, 1985), *reprinted in* DEPT. OF THE TREASURY, TREASURY NEWS, B-302 (Oct. 8, 1985).

73. The MIGA is designed to encourage the flow of investment to and among developing countries by issuing guarantees against political risk, encouraging sound investment policies in member countries, and carrying out a wide range of promotional activities. The United States has long bween an advocate of a greater role for foreign direct investment in the development process. Foreign direct investment both enhances the private sector's role in development and . . . encourages the flow of non-debt capital to LCD's.

Statement by the Honorable James A. Baker III, Secretary of the Treasury, Before the Senate Committee on Foreign Relations 9 (May 20, 1986).

74. Since 1948, the United States has maintained a vehicle to encourage United States private investment abroad. *See supra* text accompanying notes 1-9 for a discussion of OPIC's predecessor agencies and programs.